

1 endangered blue whales, and endangered Pacific leatherback sea turtles. Specifically, Plaintiff
2 challenges Defendants' authorization of the California commercial Dungeness crab trap fishery,
3 which is entangling imperiled humpback whales, blue whales and leatherback sea turtles in
4 violation of Section 9 of the ESA. *Id.* § 1538(a)(1)(B).

5 2. California Dungeness crab gear has been entangling large whales for at least a
6 decade, but the number of reported entanglements has intensified in recent years. In fact, 2014,
7 2015, and 2016 each had the highest number of reported entanglements off the West Coast ever
8 recorded. In 2016 alone, the California commercial Dungeness crab fishery entangled at least 22
9 ESA-listed animals, including at least 19 humpback whales, two blue whales, and one
10 leatherback sea turtle.

11 3. Entanglement in commercial fishing gear is one of the primary threats impeding
12 the recovery of imperiled humpback whales, blue whales, and leatherback sea turtles.

13 4. When whales and sea turtles get tangled up in Dungeness crab gear, they can
14 drown or die of starvation or infection. Humpback whales and blue whales have been known to
15 drag heavy California Dungeness crab gear hundreds of miles, which saps them of strength,
16 causes significant stress and interferes with breathing, feeding, and reproduction.

17 5. Each entanglement of a humpback whale, blue whale, or leatherback sea turtle in
18 California commercial Dungeness crab gear constitutes a "take" under the ESA and is unlawful
19 in the absence of incidental take permit from the National Marine Fisheries Service.

20 6. Defendants do not have an incidental take permit authorizing takes incidental to
21 operation of the Dungeness crab fishery. Nevertheless, Defendants authorize, license and allow
22 Dungeness crab fishermen to use traps, fishing line, buoys, and other gear in precisely the
23 manner that is entangling ESA-listed whales and sea turtles.

24 7. Defendants' authorization, permitting, oversight, and management of the
25 Dungeness crab fishery has caused, and will likely continue to cause, the unlawful death, injury,
26 capture, harm, and harassment of threatened and endangered humpback whales, endangered blue
27 whales, and endangered leatherback sea turtles.

1 properly protected from destructive practices in our oceans. In pursuit of this mission, the Center
2 has been actively involved in protecting whales and sea turtles from deadly and harmful
3 entanglement in commercial fishing gear. The Center has more than 61,000 members, many of
4 whom live in California. The Center brings this action on behalf of itself and its members.

5 14. Center members and staff live in and regularly visit California's ocean, bays,
6 beaches, and other coastal areas to observe, photograph, study and otherwise enjoy humpback
7 whales, blue whales, and leatherback sea turtles in the wild. For example, Center members
8 frequently sail, kayak, and go on whale watching tours in the Gulf of the Farallones, Half Moon
9 Bay, Monterey Bay, the Santa Barbara Channel, and off San Diego to look for and photograph
10 these animals. Center members and staff derive recreational, spiritual, professional, scientific,
11 educational, and aesthetic benefit from the presence of humpback whales, blue whales and
12 leatherback sea turtles in waters off California. The Center's members and staff intend to
13 continue to use and enjoy California waters and coastal areas frequently and on an ongoing basis
14 in the future.

15 15. Entanglements of humpback whales, blue whales, and leatherback sea turtles in
16 California commercial Dungeness crab gear kills and harms animals that Center members enjoy
17 viewing. Defendants' failure to comply with the ESA makes it less likely that Center staff and
18 members will be able to observe, study, and enjoy these animals. Additionally, Center members
19 reasonably fear that they will see a humpback whale, blue whale, or leatherback sea turtle
20 entangled in crab gear when recreating and visiting California's beaches and ocean waters.

21 16. The above-described aesthetic, recreational, scientific, educational, and other
22 interests have been, are being and, unless the relief prayed herein is granted, will continue to be
23 adversely affected and irreparably injured by Defendants' continued refusal to comply with their
24 obligations under the ESA. The relief sought in this case will redress these injuries.

25 **Defendants**

26 17. Defendant Charlton H. Bonham is named in his official capacity as Director of the
27 California Department of Fish and Wildlife ("Department"). The Department's mission is to

1 manage California's diverse fish, wildlife, and plant resources, and the habitats upon which they
2 depend, for their ecological values and for their use and enjoyment by the public. California's
3 fish and wildlife resources, including all plants and animals, are held in trust for the people of the
4 State of California by and through the Department. As Director, Mr. Bonham is a properly
5 named state official with responsibility for the actions challenged in this Complaint.

6 18. Defendant Craig Shuman is named in his official capacity as the Manager of the
7 Marine Region of the Department. As the Marine Region Manager, Mr. Shuman is a properly
8 named state official with responsibility for the actions challenged in this Complaint.

9 19. Defendants are "persons" under the ESA and subject to the ESA's requirements
10 and prohibitions.

11 **STATUTORY BACKGROUND**

12 **Endangered Species Act**

13 20. The ESA is the "most comprehensive legislation for the preservation of
14 endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180
15 (1978). Its primary purposes are "to provide a means whereby the ecosystems upon which
16 endangered species and threatened species depend may be conserved" and "to provide a program
17 for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b).

18 21. The ESA defines a "species" to include "any subspecies of fish or wildlife or
19 plants, and any distinct population segment of any species of vertebrate fish or wildlife which
20 interbreeds when mature." *Id.* § 1532(16).

21 22. Section 4 of the ESA requires the National Marine Fisheries Service, the federal
22 agency that administers the ESA with respect to most marine species, to list species as
23 "endangered" or "threatened" when they meet the statutory listing criteria. *Id.* § 1533. An
24 "endangered" species is "in danger of extinction throughout all or a significant portion of its
25 range," and a "threatened" species is "likely to become an endangered species within the
26 foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(6), (20).

27 23. Once a species is listed, the ESA provides a variety of procedural and substantive
28

1 protections to ensure not only the species' survival, but also its ultimate recovery. Section 9 of
2 the ESA makes it "unlawful for any person" to "take any [endangered] species within the United
3 States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B). This prohibition on
4 "take" also applies to certain threatened species, including the Mexico Distinct Population
5 Segment of humpback whales. 50 C.F.R. § 223.213. It is also unlawful for "any person" to
6 "cause to be committed" any offense described in Section 9, including take of endangered
7 species, or a violation of regulations pertaining to threatened and endangered species. 16 U.S.C.
8 § 1538(g).

9 24. The term "take" is defined broadly as "to harass, harm, pursue, hunt, shoot,
10 wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id.* § 1532(19).
11 "Harm" means "an act which actually kills or injures wildlife," including habitat modification or
12 degradation that "injures wildlife by significantly impairing essential behavioral patterns,
13 including breeding, feeding or sheltering." 50 C.F.R. § 17.3. "Harass" means "an intentional or
14 negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such
15 an extent as to significantly disrupt normal behavioral patterns which include, but are not limited
16 to, breeding, feeding, or sheltering." *Id.* "Take" includes both direct and indirect harm and it
17 need not be purposeful.

18 25. The term "person" includes "any officer, employee, agent, department, or
19 instrumentality . . . of any State, municipality, or political subdivision of a State." 16 U.S.C.
20 § 1532(13).

21 26. Under the ESA, "a governmental third party pursuant to whose authority an actor
22 directly exacts a taking . . . may be deemed to have violated the provisions of the ESA." *Strahan*
23 *v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997).

24 27. Before any person or agency may engage in or authorize any activity likely to
25 incidentally take a listed species, they must first obtain an incidental take permit under Section
26 10 of the ESA from the National Marine Fisheries Service for taking threatened and endangered
27 species "incidental to, and not the purpose of, . . . an otherwise lawful activity." 16 U.S.C.

§ 1539(a)(1)(B). Activities authorized under such a permit may “not appreciably reduce the likelihood of the survival and recovery of [any endangered or threatened] species in the wild.” *Id.* § 1539(a)(2)(B)(iv). The ESA further conditions the issuance of an incidental take permit on the applicant developing and committing to implement a habitat conservation plan that, among other things, minimizes and mitigates the impacts of any incidental take of endangered and threatened species to the maximum extent practicable. *Id.* § 1539(a)(2)(A)(ii), (B)(ii).

FACTUAL BACKGROUND

28. The humpback whale (*Megaptera novaeangliae*), blue whale (*Balaenoptera musculus*), and leatherback sea turtle (*Dermochelys coriacea*) are each ESA-listed species that have been, and are being, taken by Defendants’ authorization of the California commercial Dungeness crab fishery.

Imperiled Humpback Whales

29. Humpback whales are known for their aerial displays, including jumping out of the water (also known as “breaching”) and slapping the water’s surface with their flippers, tails, and heads. Humpback whales were listed as endangered in 1970 under the Endangered Species Conservation Act—the precursor to the ESA—and as endangered under the ESA upon its enactment in 1973. 35 Fed. Reg. 18,319 (Dec. 2, 1970). Entanglement in fishing gear is the most frequently identified source of human-caused injury or mortality to the species.

30. Recently, the National Marine Fisheries Service reclassified the globally listed humpback whale species into 14 different distinct population segments (“DPS”). 81 Fed. Reg. 62,260 (Sept. 8, 2016). Two of those populations are found in waters off California: the Central America DPS and the Mexico DPS. *Id.* The National Marine Fisheries Service listed the Central America DPS as endangered and the Mexico DPS as threatened. *Id.* at 62,269; 50 C.F.R. § 17.11.

31. Humpback whales in the Central America DPS generally migrate from their winter breeding grounds off Central America to feed almost exclusively off California and Oregon in spring and summer.

1 biologically important feeding areas off the coast of California, including the Gulf of the
2 Farallones, Monterey Bay, the Santa Barbara Channel, and waters off San Diego.

3 **Imperiled Leatherback Sea Turtles**

4 39. Leatherback sea turtles are the largest sea turtles on the planet. These turtles can
5 weigh up to 2,000 pounds and be up to 6.5 feet long. Pacific leatherback sea turtles were listed as
6 endangered in 1970 under the precursor to the ESA, and as endangered under the ESA in 1973.
7 35 Fed. Reg. 8,491 (June 2, 1970); 50 C.F.R. § 17.11. Pacific leatherbacks were designated as
8 California's official state marine reptile in 2012.

9 40. The recovery plan for the Pacific leatherback sea turtle states the number one
10 priority for recovering the species is to eliminate all entanglement in U.S. fisheries.

11 41. The Western Pacific leatherback sea turtle has declined more than 80% since the
12 1980s. The population is currently declining at a rate of 6% per year. The best available science
13 predicts that the species may go extinct in less than 20 years if this trend continues. The National
14 Marine Fisheries Service recently declared the leatherback sea turtle one of eight marine species
15 most at risk of extinction in the near future.

16 42. Western Pacific leatherback sea turtles migrate across the Pacific Ocean, from
17 nesting beaches in Indonesia and Papua New Guinea to waters off California, Oregon, and
18 Washington where they feed on jellyfish. They are generally found off the U.S. West Coast in
19 the summer and fall. Waters off Point Arena to waters off Point Arguello are designated as
20 leatherback critical habitat because of the vital importance of these foraging grounds to the
21 survival of the species.

22 **The California Commercial Dungeness Crab Fishery**

23 43. The California commercial Dungeness crab fishery is one of the most productive
24 fisheries in the state. In 2016, the California commercial Dungeness crab fishery landed 26.67
25 million pounds of Dungeness crab—the highest landings of any commercial fishery in California
26 after market squid. The value of these landings totaled \$83.15 million—the highest value of any
27 commercial fishery in the state.

1 44. Commercial Dungeness crab fishing is not allowed in California unless
2 specifically authorized by the Department. Commercial Dungeness crab fishermen must obtain a
3 commercial fishing license, a vessel permit, a trap permit, and a buoy tag from the Department.
4 Commercial Dungeness crab fishing is not allowed if not in compliance with applicable laws and
5 regulations.

6 45. Commercial Dungeness crab gear generally consists of traps (or “pots”), heavy-
7 duty fishing line, and buoys. The gear is configured so that a single trap is fished per line with
8 one or more buoys attached. Specifically, fishermen set heavily weighted traps on the bottom of
9 the seafloor. Each trap is connected to a buoy floating at or near the surface by heavy-duty
10 fishing line that runs through the water column. Fishermen often attach one or more buoys (a
11 “trailer buoy”) to the main line with additional line running at or near the surface. When the traps
12 are full, the configured gear can weigh hundreds of pounds.

13 46. The California commercial Dungeness crab fishery occurs in two main
14 management areas: northern California and central California. The Central California
15 Management Area includes Santa Barbara, Avila-Morro Bay, Monterey, Half Moon Bay, and
16 San Francisco-Bodega Bay. The Northern California Management Area extends from Fort Bragg
17 to the California-Oregon border, and is divided from the Central Management Area at the
18 Sonoma-Mendocino border.

19 47. In general, the Dungeness crab season runs from November 15 through June 30 in
20 the Central Management Area and from December 1 through July 15 in the Northern
21 Management Area.

22 48. Defendants permit the commercial Dungeness crab fishery to use up to 174,025
23 traps per season. The Department estimated that, during the 2014-2015 season, the total number
24 of potential traps fished was 147,175 traps based on 451 active permits.

25 49. The relative level of fishing effort (measured by the number of traps being set as
26 reflected by landings data) has been significantly higher throughout a large portion of the
27 southern part of the Dungeness crab fishery since 2014. This period coincides with an increase in

1 the number of reports of entangled whales.

2 50. An increase in Dungeness crab fishing effort in humpback whale and blue whale
3 biologically important areas when whales are present increases the risk of humpback whale and
4 blue whale entanglements, respectively.

5 51. Central California, including Monterey Bay, is a known “hot spot” for humpback
6 whale activity, especially from April-November. An increase in fishing effort in this area leads to
7 increased risk of entanglements and likely an increase in the number of entanglements that occur.

8 **Defendants’ Unlawful “Take” of ESA-Listed Whales and Sea Turtles**

9 52. ESA-listed humpback whales, blue whales, and Pacific leatherback sea turtles
10 have been, and will continue to be, killed, injured, captured, and otherwise taken by the
11 California commercial Dungeness crab fishery through entanglement in the gear used in the
12 fishery.

13 53. Entanglements can occur when the animals encounter the lines that extend from a
14 trap set on the ocean bottom to a buoy at the surface, or in the lines between the main buoy and a
15 trailer buoy at or near the surface. Entanglements occur in gear set during the commercial
16 Dungeness crab season that is actively fishing for crab. Entanglements also occur in crab gear
17 that has been abandoned or lost by fishermen.

18 54. When large whales come into contact with commercial fishing gear it can capture,
19 harm, injure, or kill them. If the animals thrash around to try and shed the gear, this can make an
20 entanglement worse. The gear can wrap around the whales’ flippers, mouths, and tails.

21 55. Entanglement in commercial fishing gear can result in immediate death from
22 drowning. Entanglements can also cause starvation through impaired locomotion.

23 56. Entanglements can also cause wounds, which can also lead to the development of
24 infections or disease. In addition, reproductive females seen dragging gear or with severe
25 wounds from entanglements have significantly lower chances of giving birth.



57. When growing animals are entangled, the lines can cinch tighter over time. Such injury can result in major tissue and bone damage and systemic infection. Constricting lines have also amputated flippers and tails. In addition, entanglements cause a significant increase in the stress hormone levels in large whales, which can lead to the development of systematic infections or increased susceptibility to disease.

58. Pacific leatherback sea turtles' large flippers and active behavior make them vulnerable to entanglement in fishing gear. Once entangled, leatherbacks usually continue to try to swim, exhausting themselves until they drown.

59. If the sea turtles do not drown, an entanglement can result in a prolonged period of forced submergence that triggers severe metabolic acidosis, which often drains the turtle's strength so significantly that it is unable to recover. As a result, many leatherbacks do not survive entanglements even if they do not immediately drown.

60. According to the National Marine Fisheries Service, the California commercial Dungeness crab fishery has been entangling ESA-listed humpback whales for at least ten years. Reports of entanglements have increased in recent years.

61. In fact, 2014, 2015, and 2016 each had the highest number of reported entanglements off the West Coast since the National Marine Fisheries Service started keeping

1 records in 1982. California commercial Dungeness crab gear was responsible for the majority of
2 known causes of the entanglements in 2014, 2015, and 2016.

3 62. Based on information and belief, entanglements of ESA-listed animals in
4 California commercial Dungeness crab gear have occurred and are occurring in 2017, and are
5 reasonably likely to continue once the commercial Dungeness crab season opens.

6 63. Not all entanglements of large whales or sea turtles are observed. Reported
7 entanglements represent only a portion of actual entanglements.

8 64. In 2014, the National Marine Fisheries Service confirmed multiple entanglements
9 of humpback whales in California commercial Dungeness crab gear. Each of these
10 entanglements constitutes an unlawful “take” under the ESA.

11 65. In one instance, a severed tail was found with two separate sets of Dungeness crab
12 gear attached. Another entanglement resulted in Dungeness crab gear being wrapped tightly and
13 twisted around the humpback’s tail three times and caused deep lacerations.

14 66. In 2015, the National Marine Fisheries Service confirmed six separate humpback
15 whales entangled in California commercial Dungeness crab gear. Each of these entanglements
16 constitutes an unlawful “take” under the ESA. The agency determined several of these
17 entanglement events constituted “serious injuries,” meaning an “injury that will likely result in
18 mortality.” 50 C.F.R. § 216.3.

19 67. In 2015, a dead leatherback sea turtle was found off San Francisco, California
20 entangled in fishing gear, with the rope and buoys wrapped completely around its neck.

21 68. Also in 2015, in response to the number of large whales entangled in California
22 Dungeness crab gear, Defendants convened a “California Dungeness Crab Fishing Gear Working
23 Group” to discuss short and long-term strategies to reduce the risk of whale entanglements in
24 crab gear.

25 69. The Working Group cannot substitute for the Congressionally-mandated process
26 in the ESA required to authorize the incidental take of humpback whales, blue whales, or
27 leatherback sea turtles. Moreover, since the convening of the Working Group, takes of ESA-

1 listed species in Dungeness crab gear have continued.

2 70. Most recently, 2016 was another record-breaking year for reported entanglements
3 off California. In 2016, the National Marine Fisheries Service confirmed 22 separate ESA-listed
4 animals entangled in California commercial Dungeness crab gear: 19 humpback whales, two
5 blue whales, and one leatherback sea turtle. Each of these entanglements constitutes an unlawful
6 “take” under the ESA.

7 71. Some of these entanglement events caused significant injuries. For example, line
8 from the commercial Dungeness crab gear cut into the tissue of one humpback whale so deeply
9 that the line was barely visible. In another instance, lines from commercial Dungeness crab gear
10 wrapped around the body, fins, and mouth of a humpback whale two times. And one well-known
11 female blue whale, called both “Cadillac” and “Delta” due to the shape of her tail, was reported
12 entangled in California commercial Dungeness crab gear in Monterey Bay in July 2016. She was
13 later seen near the Palos Verdes area in October 2016 still entangled.

14 72. Whales have been reported entangled up and down the coast of California.
15 Central California, in particular Monterey Bay, had the highest number of reported whale
16 entanglements in 2016. The leatherback sea turtle confirmed entangled in California Dungeness
17 crab gear in 2016 was also reported entangled in Monterey Bay.

18 73. The recent increase in reported whale entanglements is correlated with the
19 increase in annual Dungeness crab landings near Monterey Bay.

20 74. Defendants received information from aerial surveys that in one day in June 2016,
21 there were an estimated 2,086 traps set in Monterey Bay, with the greatest concentration between
22 the 80-90 meter depth contours.

23 75. Defendants’ reduction of the number of permitted Dungeness crab traps would
24 lower the likelihood of whale and sea turtle entanglements. For example, Defendants’ restriction
25 of the number or density of Dungeness crab traps in the Monterey Bay area would lower the
26 likelihood of whale and sea turtle entanglement.

27 76. Defendants authorize, license, and allow Dungeness crab fishermen to use traps,

1 fishing line, buoys, and other gear in a manner that is likely to result in the entanglement of
2 humpback whales, blue whales, and leatherback sea turtles.

3 77. Defendants are aware that humpback whales, blue whales, and a leatherback sea
4 turtle have been entangled in gear used in the California commercial Dungeness crab trap
5 fishery.

6 78. For example, since at least April 2015 the California Department of Fish and
7 Wildlife has been discussing the increase in reported entanglements of ESA-listed whales in
8 Dungeness crab gear with the National Marine Fisheries Service's Protected Resources Division.

9 79. And, in response to entanglements in Dungeness crab trap gear that included a
10 legible buoy tag, Defendants contacted Dungeness crab trap permit holders to facilitate
11 interviews about where, when and how the trap was set and to facilitate return of the gear to the
12 fisherman.

13 80. The National Marine Fisheries Service has found that the Department has
14 authority to conserve resident species of threatened or endangered wildlife, including, but not
15 limited to humpback whales, blue whales, and leatherback sea turtles.

16 81. Defendants' acts and omissions in authorizing, permitting, managing, and
17 overseeing the commercial Dungeness crab fishery have caused, and will continue to cause,
18 unlawful take through entanglements of humpback whales, blue whales, and Pacific leatherback
19 sea turtles.

20 82. Defendants lack an incidental take permit for the take of ESA-listed humpback
21 whales, blue whales, or leatherback sea turtles in the California commercial Dungeness crab
22 fishery. In the absence of a valid incidental take permit, each entanglement of a humpback
23 whale, blue whale, or leatherback sea turtle constitutes an independent violation of Section 9 of
24 the ESA.

25 **CLAIM FOR RELIEF**

26 **Violation of Section 9 of the ESA**

27 83. Plaintiff re-alleges and incorporates, as if fully set forth herein, each and every

allegation in the preceding paragraphs of this Complaint.

84. Defendants' authorization, permitting, licensing, overseeing, and management of the California commercial Dungeness crab fishery is killing, injuring, harming, capturing, and otherwise causing "take" of humpback whales, blue whales, and leatherback sea turtles, in violation of the ESA, 16 U.S.C. §§ 1538(a)(1)(B), 1538(a)(1)(G); 50 C.F.R. § 223.213.

PRAYER FOR RELIEF

For the reasons stated above, Plaintiff respectfully requests that this Court:

1. Declare that Defendants have violated and are violating the Endangered Species Act by taking listed species without an incidental take permit;
2. Order Defendants to apply for an incidental take permit from the National Marine Fisheries Service under the Endangered Species Act by a date certain;
3. Enjoin Defendants from continuing to authorize and permit activities that take ESA-listed species with commercial Dungeness crab gear without an incidental take permit from the National Marine Fisheries Service;
4. Award Plaintiff the costs of this litigation, including reasonable attorney's fees; and
5. Provide such other relief as may be just and proper.

Respectfully submitted this 3rd day of October,

/s/ Kristen Monsell

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